THE CONFLICT BETWEEN PROPERTY RIGHTS AND THE PUBLIC INTEREST IN OCCUPATIONAL LICENSING

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Introduction

This paper examines the conflict between private property rights of persons in the practice of their occupations and the public interest in state regulation of certain occupations. Part I explores the history of property and rights in property. Part II describes how sociological, legal and economic factors compete in the arena of state and private regulation of occupations. Part III focuses on how Michigan regulates physical therapists, as an example of state regulation of an occupation, and on how the issue of direct access draws in the conflict between private property rights and the public interest. This paper concludes by describing what issues in today's regulatory environment involve the conflict between private rights and the public interest and how that conflict is being increasingly resolved in the courts.

The importance of the presentation here of this conflict lies in its relevance to legislators and regulators having rulemaking authority who seek to modify existing regulatory schemes or who seek to regulate new occupations. In the same way, the conflict between private rights and the public interest is critical to professional associations which seek to avoid state regulation by imposing on its members rules and standards designed to negate the need for governmental regulation.

These issues are also of concern to the various interest groups which may have a stake in the regulation of an occupation.

To these interest groups, the issues discussed in this paper must be at the heart of any efforts to influence the state regulation or deregulation of a certain occupation. The way the conflict between private rights and the public interest is confronted by public institutions, like the legislatures and the courts, and by private bodies, like interest groups and professional associations, will determine not only the extent of current regulation but also will determine the nature and extent of future regulation of occupations.

At the heart of state occupational licensing of professions is the protection of the public interest. A constitutional concept, the public interest is defined within the bounds of not only the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution but also the privileges and immunities clause and even the preamble of the Constitution (Erler, pp 43-44; Robinson, pp 69-70).

Paralleling protection of the public interest is property and the evolution of property rights in the United States. Property in feudal Europe originally meant ownership of land but gradually expanded under the guild system to include personal rights to practice a trade. (Rubin, pp 33-35).

In American constitutional theory, liberty and property are broad concepts which the United States Supreme Court has only recently viewed in the context of procedural due process "as artful words of limitation on the application of due process." (Robinson, p 71). As Robinson observes, the Court has been more concerned in recent years with the procedural question of what

process is due rather than in the defining of liberty and property. (Ibid., pp 71-72).

But, as we see from the constitutional debates and early court decisions involving liberty and property rights, freedom of economic enterprise and the freedom to develop one's talents and pursue one's ends were central to constitutional construction. (Ibid.).

In examining the impact of natural rights jurisprudence on constitutional construction, Antieau concludes that the use of the term "liberty" in the Fifth Amendment "is a composite of many particular rights or freedoms" and that "the courts have gone to natural rights jurisprudence when concerned with specifying the rights" not explicitly mentioned in the Constitution. (Antieau, 165). What this means is the government cannot interfere in the lives, liberty and property of the people. (Ibid., p 155).

To John Locke, the legislature is prohibited from being "absolutely arbitrary over the lives and fortunes of the people." (Ibid.). Burlamaqui and James Otis concurred. In 1764, Otis argued: "No legislative [sic], supreme or subordinate, has a right to make itself arbitrary." Thomas Jefferson and Samuel Adams agreed the state "was to have no arbitrary power over the citizen." (Ibid.).

In affirming that the Constitution was to be interpreted in light of natural law principles, Justice Chase writing for the Supreme Court in Calder v Bull (1798) maintained that the "people of the United States erected their constitutions, or forms of government, to establish justice, to promote the general welfare,

to secure the blessings of liberty and to protect their persons and property from violence." (Ibid., pp 155-156. To Justice Chase, "the purposes for which men enter into society will determine the nature and terms of the social compact and as they are the foundation of legislative power, they will decide what are the proper objects of it." (Ibid.).

In describing the natural law principles in the U.S. Consitution, Justice Chase wrote:

> There are certain vital principles in our free Republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact cannot be considered a rightful exercise of legislative authority. (Ibid.).

American constitutional law tempered the natural law prohibition on arbitrary governmental action by its infusion of substantive due process principles in cases upholding government regulations. The courts have upheld reasonable regulations "when such regulations do not conflict with any constitutional inhibition or natural right." (Ibid., p 156).

There has been a marked shift in modern times from natural rights to a positivist perspective in the law, implying "a change in the conception of property and liberty." (Robinson, p 86).

Robinson argues that the "shift to positivism necessarily implies a diminution in the strength of rights protection, but is has also introduced greater potential scope to definition of rights." (Ibid., p 87). He maintains that the modern concept of liberty retains at least the spirit of Lockean liberalism, meaning freedom from governmental interference, but that "modern positivism has transformed property into an almost free-form protection for all manner of claims that individuals may maintain against the state pursuant to some 'entitlement' conferred by contract or statutory instrument or some other amorphous source like the common law." (Ibid., p 87).

How the Supreme Court treated the question of property rights under the due process clause of the Constitution evolved from a natural rights to a positivist approach with its post-Civil War interpretations of the Fourteenth Amendment. (Robinson, p 73). In substantive due process analysis, the Supreme Court originally characterized occupational pursuits as liberty, but later expressed them as property. (Ibid., p 86).

In either event, evolving notions of liberty and property are tempered by the role of government as the protector of rights. In the context of occupational pursuits, this has grown to include not only the protection of the right to pursue an occupation but also the right of the public to be protected from harm resulting from the pursuit of an occupation. The state seeks to protect that public interest through occupational licensing. (Ibid.).

How the right to pursue an occupation conflicts with the public interest in preventing harm resulting from a practitioner's

pursuit of an occupation is the subject of this paper. The approach of this paper will include examination of this conflict from a legal, economic and sociological perspective to determine not only the contours of the conflict but also to examine the parameters of occupational licensing in general in light of that conflict.

I. The Evolution of Property and Rights in Property.

Occupational licensing laws in the United States can be traced to rules enacted in the 19th century by national societies governing physicians and lawyers. (Rubin, p 31). How property rights in occupations evolved as a legal concept in the United States can be traced back centuries before.

As Rubin describes it, the history of American law "must be woven with the English and European experience which preceded it, and which continues to exert conceptual force." (Rubin, p 32).

In the 11th and 12th centuries, according to Rubin, social and economic vocational societies were formed, and in the 13th century education became the "demarcation" point for professions. (Ibid.). The specialized training members of vocational societies received created solidarity among their ranks but made them vulnerable to uncertainties of the feudal economy. (Ibid.).

Later, in the 15th century, these guild cartels were closely knit, restricted membership to those meeting stringent education and other qualifications, and required members to adhere to tight cartel practices. (Ibid.). As the feudal economies of Europe collapsed and freed workers from obligations to the land of their

feudal lords, "[t]ravel became easier, and artisans and merchants were attracted to the prospering trade centers. Unable to be absorbed into the restrictive guild system, these individuals entered into competition with the guild members." (Ibid.).

English common law courts led the way in establishing and in protecting the right to earn a living. At the same time those courts came to recognize the social and economic advantages of competition with principles that would "reappear centuries later in United States antitrust policy." (Ibid., p 33).

English guilds "turned to the state to secure an enforceable monopoly franchise." (Ibid.). Western European governments then began to charter guilds and, as a result of the limited access afforded persons seeking membership in the guilds, the public had little choice but to pay high prices for goods and services provided by these statutory monopolies. (Ibid.).

The common law courts again responded to the public outcry over poor quality goods and high prices in two ways, as Rubin writes:

> First, the courts evolved the doctrine that certain occupations and businesses enjoy a special relationship with the public founded on the indispensibility of the service performed and the existence of a monopoly in its provision. Where such factors were present, the activity was considered to be a "public calling," on which the courts imposed an obligation to provide competent service at a reasonable price. Second, the courts came to identify certain "skilled callings" -- occupations in which the practitioner was possessed of special

> training and represented to have special skill. If the service was performed negligently or, later, simply without the requisite standard of proficiency, an action in damages was authorized. (Ibid.).

The guilds were exempt from the obligations imposed by the courts on nonregulated occupations because they were chartered by the state and carried the presumption of state regulation of their activities. This is like the federal antitrust exemption for state regulated occupations today. As a result, the guilds remained strong until the dawn of the Industrial Revolution. (Ibid., p 34). The guild system broke down as the middle class grew, as knowledge and technology made many practices of the guilds obsolete, as new or specialized occupations eclipsed the guild structure, and as philosophical and economic forces merged to overcome the system. (Ibid.).

As nations industrialized and diversified their economies, attitudes about the individual's rights in society changed. As an example, in the Declaration of Independence, Jefferson spoke of "life, liberty and the pursuit of happiness," not the Locke trinity of life, liberty and property. The phrase "pursuit of happiness" appears in Locke's "An Essay Concerning Human Understanding" (1690):

> As therefore the highest perfection of intellectual nature lies in a careful and constant pursuit of true and solid happiness; so the care of ourselves, that we mistake not imaginary for real happiness, is the necessary foundation of our liberty.

> The stronger ties we have to an unalterable pursuit of happiness in general, which is our greatest good . . . the more we are free from any necessary determination of our will to any particular action. (Erler, p 50).

For Locke, the "pursuit of happiness," as Erler maintains, is "intimately connected with the right to property." Further, as Locke argues in The Reasonableness of Christianity, "Mankind" must be allowed to pursue happiness and cannot be hindered from doing so. (Ibid.).

Relating the right of self-preservation to the right to the pursuit of happiness, Leo Strauss wrote:

> The former is the right to 'subsist' and implies the right to what is necessary to man's being; the second is the right to 'enjoy the conveniences of life' or to 'comfortable preservation' and implies, therefore, also the right to what is useful to man's being without being necessary for it. (Ibid., p 51).

Erler maintains the right to property and the right to the pursuit of happiness are derivative of the right to life, and, therefore "the right to property and the right to the pursuit of happiness must be accorded the status of natural rights." Locke, in contrast, maintained that the 'pursuit of happiness,' implies a "right to possess beyond what is necessary for mere life" and "is also the ground of political liberty." The desire to pursue "true and solid happiness as the greatest good," is proof for Locke that

"the human mind is not determined and that human beings are free to choose the means -- reason -- of securing their happiness." (Ibid.).

> In the political context, this natural freedom means that "consent of the governed is the necessary requisite for legitimate government. . . This means that civil society must, above all, provide the security for the external goods -- in Lockean terms "properties -- necessary for the pursuit of happiness." (Ibid.).

James Wilson wrote in 1774 that "all men are, by nature, equal and . . . all lawful government is grounded on the consent of those who are subject to it: such consent was given with a view to ensure and to increase the happiness of the governed, above what they could enjoy in an independent and unconnected state of nature." (Ibid.).

To the Framers, the rights of property and the property in rights was central to the U.S. Constitution. In Federalist No. 1, Hamilton, for example, argued the Constitution was "additional security, which its adoption will afford to the preservation of republican government, to liberty and to property." (Kammen, p 1).

In Federalist No. 2, Jay pointed to the interest that members of the 1774-1775 Continental Congress had in "public liberty and prosperity" in arguing that "to preserve and perpetuate it, (sic) was the great object of the people in forming [the Constitutional] Convention." (Ibid.). The American concept of property as

engendered in the 1789 Constitution is broader than the comprehensive view Locke had of property referring "not so much to things in themselves but to the act or conditions of possession." (Ibid., p 8).

During most the 18th century the moral justification for private property shifted from that of natural law towards a theory demonstrating its historical origins. The key texts of the former being Locke's Second Treatise (1689), Francis Hutcheson's Short Introduction to Moral Philosophy (1747) and A System of Moral Philosophy (1775) and those of the latter being Adam Smith's Lectures on Jurisprudence (1762, 1766) and John Millar's Of the Origin of the Distinction of Ranks (1771). (Ibid.).

Both sides in the debates over the 1789 Constitution were concerned about property and the new government. How the new government viewed property is expressed in the opinion of Justice Paterson in the case of Vanhorne's Lessee v Dorrance (1795):

> [T]he right of acquiring and possessing property and having it protected is one of the natural, inherent and unalienable rights of man. (Ibid., p 9).

The Records of the Federal Convention are silent on the status and protection of property per se, as Kammen maintains. (Ibid.). Kammen argues that as a consequence:

> Equally signficant, and perhaps even more so, the Preamble to the Constitution -- its clearest statement of underlying assumptions and values -- never mentions

> property. It does mention liberty and justice, of course, as well as domestic tranquility. We know that many of the Framers believed that domestic tranquility depended upon the contentment contingent upon a widespread and roughly equal distribution of property. If the Lockean vision conflated most other values under an expansive conception of "property," then perhaps the Framers were less than full-blooded Lockeans. We cannot be sure; but I regard it as a possibility that requires serious consideration. (Ibid.).

The other thread running through the fabric of the American Constitution is the concept of liberty. As the progenitor of the Constitution, the Declaration of Independence is a succinct expression of the social contract that forms "the legitimate foundation of civil society." (Erler, p 46). The Declaration's "self-evident truth" that "all men are created equal" has as its source the "laws of nature and nature's God" and is the ground for political morality in this country. (Ibid.).

Erler maintains that humans are a self-directed species having no natural rulers and possessing the ability to choose their own destiny, and as a consequence "human beings are capable of individual self-consciousness and, although a member of a species, can see themselves as individuals within the species." Their minds are, according to Erler, not determined and and are equal. There are no natural rulers, and therefore liberty is the inexpungable concomitant of equality. (Ibid.).

At the core of the American Revolution is the rejection of the notion of the "divine right of kings." Modern notions of life, liberty and property flow naturally from human equality, Erler contends. These are individual rights "known to the social contract philosophers as "natural rights" -- the dictates of the "laws of nature and nature's God." (Ibid., p 47).

At the heart of the Declaration of Independence is the belief that "the rights of man derived not indeed from any particular constitution or positive law, but from . . . the laws of nature and nature's God that set the standards and bounds of civil society, and made possible not only a government derived from the principles of human nature, but a form of government that could honor human nature." (Ibid.).

The principle embodied in the American Revolution of the natural equality of all human beings shook the world order, especially that in Europe, changing the relationship between the governing elites and the governed. In contrast to the Declaration of Independence, the Magna Carta was not a natural rights document. Instead, it was a product of British history, resulting from a struggle between King and nobles. It did not declare the universal rights of man, as did the Declaration of Independence. (Erler, p 49). A.E. Dick Howard maintains the drafters of the Magna Carta "were rebelling against the abuse of royal power," and did not seek "to remake the fabric of feudal society" but rather "to restore customary limits on the power of the Crown." (Ibid.).

During the stormy debates at the Constitutional Convention, the Antifederalists feared class conflict resulting from the property of the lower classes being increasingly at risk and argued the "proposed Constitution offered prosperity at the price of liberty." (Kammen, p 10). In contrast, Madison contended in Federalist No. 10 that property rights developed from "the diversity in the faculties of men." (Ibid.). Kammen maintains that "Madison proclaimed the unequal distribution of property to be so long-standing in nature as to be normative; and he concluded with the judgment that 'a rage . . . for an equal division of property" would be a "wicked project," though one that was less likely to arise within the extended sphere of the newly proposed government." (Ibid., p 11).

Madison believed government was instituted to protect property and to achieve that purpose he advocated that propertied persons serve in public offices. (Ibid., citing Federalist No. 54). Madison, however, expanded the meaning and scope of property in his essay "Property" published on March 29, 1792, in The National Gazette:

> In its larger and juster meaning, [property] embraces every thing to which a man may attach a value and have a right; and which leaves to every one else the like advantage.
>
> In the former sense, a man's hand, or merchandise, or money is called his property.

> In the latter sense, a man his property in his opinions and the free communication of them.
>
> He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them.
>
> He has property very dear to him in the safety and liberty of his person.
>
> He has an equal property in the free use of his faculties and free choice of the objects on which to employ them.
>
> In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights. (Ibid.).

Thus, Madison painted an expansive view of property which included the right to choose and practice a profession or other calling. As Madison argued, if the purpose of government was to protect property and the rights in property and if one's occupation was a property right, the government and the Constitution which created it protected the right to practice an occupation of one's choosing.

Very early in American history following the Declaration of Independence in 1776, private property enjoyed a high degree of sanctity. Later, beginning roughly in 1837, the regard for private property became tempered "by growing recognition of the public interest as a collectivity, and by negative experiences with monopolies and corporations that served the needs of an elite few rather than the democratic many." (Kammen, p 15).

Madison viewed the right to property "in its full political sense -- as a fence to life and liberty." (Erler, p 58). Erler points out that Madison "did not, any more than Locke, posit an absolute right to property; the right to property was justified in purely political terms, i.e., in terms of the common good." (Ibid.).

To Madison, the "regulation of the various and interfering interests form the principal task of modern legislation." (Ibid.). Erler argues this means that "property can be regulated from the point of view of maintaining a free economy as a fence to liberty" because, as he contends, "it is the fence to [the] consent [of the governed]." (Ibid.).

In contrast, Jefferson's liberal view of property was shaped more by Scottish communitarianism than Lockean individualism and by "his understanding of the requirements of republican government and his view of human nature." (Yarbrough, p 65). Yarbrough argues that "Jefferson's republicanism was tempered by his commitment to the principles of liberal democracy." (Ibid.).

Jefferson maintained that "the right to property is founded on certain natural wants, in the means by which we are given to satisfy those wants, and the right to what we acquire by these means, without violating the similar rights of other sensible beings." (Ibid., p 69). Yarbrough contrasts the views of property Madison and Jefferson held:

> Whereas Madison saw the rights of property originating in men's unequal faculties alone, and believed that society's first task was to protect these unequal faculties, Jefferson believed that property was

> grounded in two conflicting natural principles: men's equal wants and their unequal talents for satisfying these needs. It is this need to strike a balance between these two contradictory aspects of human nature, rather than the mistaken belief that property is merely conventional, which gives Jefferson's understanding of property its distinctive character. (Emphasis original). (Ibid.).

Jefferson believed in the wide distribution of property in society but also advocated that "[a]s long as property was rightly used, that is, that it promoted industry, government must protect its unequal distribution." (Ibid., p 71). In viewing America as a middle class society in which class conflict is muted, Jefferson "believed in the power of institutions and the environment to shape human character." (Ibid., p 73)

Jefferson maintained that American republican institutions unleashed "new opportunities for self-development" by "affording each individual the equal opportunity to pursue his own happiness." (Ibid.). He "chose to extend the rights of persons at the expense of property" and believed "political participation and civic spirit were too important to be sacrificed to the rights of property." (Ibid., pp 74, 75).

Indeed, Jefferson "saw a powerful connection between one kind of property, land, one way of life, farming, and the perpetuation of republican virtue." (Ibid., p 76). This view is consistent with that of the French Physiocrats, who maintained

that "it was principally nature, and not labor, which supplied the materials for human prosperity." (Ibid., p 78).

Locke disagreed with this view, arguing that "[e]verything of value derives from man's labor, that is his transformation of nature" and that the "right to property is ultimately grounded in each individual's original 'Property in his own person" with labor being "merely an extension of that original property." (Erler, p 53). According to Locke:

> Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a Property in his own Person. This no Body has any Right to but himself. The Labour of his Body, and the Work of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joyned to it something that is his own, and thereby makes it his Property. . . . For this Labour being the unquestionable Property of the Labourer, no man but he can have the right to what that is once joyned to, at least where there is enough, and as good left in common for others. (Ibid., pp 52-53, quoting Locke's Second Treatise, p 27).

Jefferson, in his later writings, repudiated Physiocratic theory, conceding the value of labor in the production of wealth. (Yarbrough, p 78). Jefferson defended on moral grounds one form of labor especially, that being farming, because he "believed that the preservation of republican government depends primarily upon the character of the people" and, as he maintained, "[a]griculture

was important because it helped to mold that character." (Ibid., p 79).

Jefferson's republicanism demonstrated faith in the common people and in the tempering effect republican institutions would have on human nature. Like Locke and Madison, though, Jefferson "believed that men entered into society to secure their property as well as their persons, and that the protection of property was a legitimate concern of society." (Ibid., p 69).

Influenced by natural rights jurisprudence, the U.S. Supreme Court after the Civil War began to constitutionalize "freedom of economic enterprise as one of the rights to be protected against the state." (Antieau, p 165). As an example, the high court in the 1897 case of Allgeyer v Louisiana described this right as "one of those inalienable rights relating to persons and property that are inherent, although not expressed in the organic law." (Ibid.).

In the Slaughter House Cases, the four dissenting justices maintained that the 14th Amendment to the U.S. Constitution protected freedom of enterprise as a natural right of free men, and in a concurring opinion in the Butchers Union Case, three justices argued "[t]he right to follow any of the common occupations of life is an inalienable right" protected under the 14th Amendment. (Ibid., p 166).

As to inherent rights which must be protected, Justice Field, who concurred in the Butchers Union Case, wrote:

> Among these inalienable rights . . . is the right of men to pursue their happiness, by which is meant the right to pursue any

> lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give them their highest enjoyment. (Ibid.).

In recent years, the U.S. Supreme Court has recognized that "as an aspect of liberty there is freedom in the individual to develop his talents and to pursue the ends he deems fitting subject, as in the case of other constitutional liberties, to restraints necessary to protect the common weal." (Ibid., p 167).

In a 1957 case, the Court held that "[a] State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. Certainly, the practice of law is not a matter of the State's grace." (Ibid.).

Modern legal theorists have, in large measure, discarded the natural rights view of liberty and property in favor of a more positivist perception of those concepts. Robinson maintains that "the 'realist' tenor of modern thought is hostile to the idea of natural law," and "[w]hile some rights may be 'fundamental' in something approaching a higher law conception, the source of most rights is nothing more exalted than the changing secular convenience of the state." The result is that although the strength of rights has diminished, the scope of rights has broadened. The evolution of rights has "introduced a fresh source of uncertainty and controversy into the definition of rights for purposes of constitutional due process" with "the Supreme Court's

melding of nonconstitutional sources of rights creation with constitutional definition of rights protection." (Robinson, p 102).

Scholars credit the New Deal as the beginning of this new era in American constitutionalism. (Kammen, p 16). Those who urged the new approach to American constitutional law contended that "the protection of property must be justified by utilitarian considerations, that social needs should affect our decisions pertaining to property rights, and that individual interests ought to prevail only where they enhance the general interest." (Ibid.).

To Kammen, this changed approach to constitutional rights is "not entirely new," maintaining that the new emphases "are consistent with the Preamble to the United States Constitution" and "James Madison's prescription for wise and just governments: namely, that they must "equally respect the rights of property, and the property in rights."" (Ibid.).

Debate over the extent of regulation of licensed professions centers on the argument that "[p]roperty rights exist at the expense of human rights; human rights therefore can be protected only to the extent that the right to property is diminished or extinguished." (Erler, p 44). To protect the dignity of individuals living in a civil society, Erler concludes "it is necessary for the rights of the community to assume priority over individual rights." This in itself requires a modified view of the proper relationship of individual and state." (Emphasis original). (Ibid.). It is against this evolving concept of property that the public interest and need for regulation of licensed professions is explored in the next section from different perspectives.

II. Rationales for State Regulation of Professions.

A. From an Economic Perspective.

State legislatures are typically convinced to regulate a particular profession by the argument that regulation will raise the quality of services the profession provides the public. This is accomplished by providing "a standard by which professional competence may be judged helping to avoid negative third party effects which may result from incompetent practitioners" and by providing "a higher standard of quality." (Carroll and Gaston, p 959).

Typically, occupational licensing laws "attempt to increase the quality of inputs (qualifications of entrants into the profession or trade) in the belief that this will alter the quality of services actually received by the consumer," even though it is doubtful this actually increases the "quality of services actually received by the consumer." (Ibid., p 960).

In general, licensing is "a form of monopoly created by entry restrictions," the implications of which are analyzed within that framework. (Ibid.). Faith and Tollison maintain that "licensing is an important application of the theory of economic regulation, and it is standard to analyze such regulation in terms of groups using the political process to increase their wealth through artificial restrictions on competition in their occupation." (Faith and Tollison, p 232).

While practitioners, according to Faith and Tollison, want to restrict entry into their profession and control prices, the state

determines the extent of the monopoly rights it grants to a licensed profession, first, by "the degree of political competition for the right to supply monopoly privileges," and, second, by "the proportion of market demand of the regulated service accounted for by government officials." (Ibid.).

As to the first variable, government officials, especially in nations where there is no democracy and a strong command economy, "stronger monopoly rights will be obtained when the state has more enforcement power and little political competition prevails for the right to supply monopoly rights." (Ibid.). As to the second variable, state officials face a dilemma: they face a trade-off in "their dual role as consumers of regulated services and suppliers of regulation." (Ibid.).

To determine when government will regulate, Faith and Tollison maintain that "[i]f government buyers are not in the market, it always pays them to regulate." (Ibid., p 234). In this instance, governments capture "the relevant monopoly rents and bear no direct costs of monopolization." (Ibid.). They point out that "if the government demand curve lies to the left of the market marginal revenue curve, the government gains from regulation." (Ibid., fn 5). On the other hand, if the "government buyers are the only buyers in the market, it never pays them to regulate because of the familiar welfare-triangle loss." (Ibid.).

To determine when government will regulate an occupation, the argument is:

> Other things equal, an increase in aggregate private demand will make it more likely

> that government will regulate the occupation. . . In sum, if the occupation/industry in question is constant-cost and price discrimination is not possible, there exists some critical market share of output bought by government, such that for values greater than this critical value government will not regulate and for values below it government will always regulate. (Ibid., p 235).

Two assumptions are necessary in examining the increased costs associated with the decision of government to regulate or to encourage competition in a particular occupation: first, "if government creates a monopoly from which it buys as a monopsonist, we assume that government wins the bilateral bargaining process that ensues (Faith and Tollison contend this means that "the monopoly will be constrained to sell its output at marginal cost"), and, second, "we assume that if government acts as a monopsonist (imposes marginal cost pricing), it determines price for the entire market." (Ibid., p 235).

If government is the only buyer in the market, Faith and Tollison maintain that "the government will both monopolize and require cost pricing" and that "[p]rofit-maximization implies that the monopolist will produce the competitive output and receive the profits implied by increasing marginal costs because the licensed monopolist is forced to price at marginal cost." (Ibid., pp 235-236).

The consequences of this are summarized as follows:

> In sum, if the industry in question is characterized by increasing costs and price discrimination is not possible, then: a) if government comprises none of the market for the output, government will regulate; b) if government comprises all of the market, government will regulate by forcing the industry to produce at the competitive solution (P = MC) and in addition will sell licenses to capture the producer surplus at this output; c) for cases in between, government will always sell licenses to capture the profit that exists at all levels of output because of the rising supply curve, and as government purchases reach some critical market share, government will also specify the industry's pricing policy. If price discrimination is possible, government will always regulate by forcing the industry to sell to government at marginal cost, letting the monopolist be unconstrained with respect to the remainder of the market and charging a license fee to capture the profit associated with total output. (Ibid., p 237).

Analyzing licensing from another economic perspective, we see that barriers to entry of an occupation, like licensing, "create windfall gains (rents)" and these prospective rents provide an "important impetus for licensure" with the threat of loss of rents "a major reason why removal of licensure is so strongly resisted by members of a licensed profession." (Benham, p 14).

Another economic rationale for licensing of occupations is engendered under the "public interest" theory which assumes "'that regulation is established largely in response to public-interest-related objectives' as screened through and advocated by

agents like public interest groups and entrepreneurial politicians." (Heffron, p 150).

Heffron defines the rationale behind government regulation of occupations in the context of the conclusion in Cushman's study, The Independent Regulatory Commissions, that "the old style economic regulatory agency was created to solve major economic problems and that Congress acted largely with the public interest at heart in passing enabling legislation." (Ibid.).

> A major purpose in creating a commission was to provide machinery to secure the accurate and expert information necessary to the solution of that (economic) problem. (Ibid.).

To Chicago school theorist and federal appeals Judge Richard Posner, economic regulation "may be initiated to serve the public interest function of redistributive taxation; regulation permits internal subsidies which compel 'the provision of certain services in quantities and at prices that a free market would not offer.'" (Ibid.).

In contrast, advocates of the "industry protection" theory of economic regulation maintain that "the industry itself desires regulation in order to protect the established producers and limit entry by others." (Ibid.). At one extreme, Gabriel Kolko argues that "the act setting up the Interstate Commerce Commission was sought mainly by railroad executives to protect their own interests in an increasingly unstable economic environment." Kolko maintains that because the "railroads primarily wanted

protection with a minimal amount of regulation," the result was "the Interstate Commerce Act was very weak and contained very few provisions requiring competition among the established railroads." (Ibid.).

Under James Q. Wilson's "politics of regulation" approach to the theory behind old style economic regulation, regulation is broken down into an analysis of their relative costs and benefits, which may or may not be monetary and which may be widely or narrowly distributed. In the context of occupational licensing, Wilson believes client politics emerge with regulatory policy involving most professional licensing "very similar to the industry protection origin theory; the small, identifiable group that is likely to benefit from the regulation or subsidy or entry restriction will organize to push for its passage." The result is that "since costs are dispersed, no single individual is strongly affected and little opposition to the creation of the regulation occurs." (Ibid., pp 150-151).

Determining the demand for regulatory services, which is a public good, determines the extent to which an occupation should be regulated. Public choice theorists, like Buchanan, Downs, Lindblom, Olson, and Tullock, believe demand can be determined by the extent to which "people in government aim to maximize their personal advantage." (Reynolds, p 344). To Niskanen, demand is measured by the extent to which the bureaucrat seeks "to maximize the budget" for the agency, which itself is "determined by bargaining between the bureau and the legislature." (Ibid., p 345).

In either event, the optimal production level of the public good (i.e., regulatory services) is the level where maximum public (consumer) satisfaction is reached. (Ibid., p 340). If this public good is underproduced, "the marginal utility yielded by the last increment of resources devoted to public goods is greater than the marginal utility of the last increment devoted to private goods." (Ibid., pp 340-341). In this event, consumer satisfaction is increased by shifting responsibility for regulation of an occupation from the private sector (i.e., professional association regulation) to the public sector (i.e., state regulatory boards). If, however, this public good is overproduced, regulation should shift from the public to the private sector. (Ibid., p 341).

B. From a Legal Perspective.

Regulation of professions began in earnest in the 1870s following earlier regulatory efforts and a period of laissez-faire values. (Rubin, p 35). Rubin traces the development of regulation of professions "when graduate professional programs began to coalesce into national professional associations," among the first being the American Medical Association. (Ibid.).

Parallel to the development of regulation over professions was the shift from "natural rights to positivist perspective in the law" in interpreting the concepts of liberty and property. (Robinson, pp 86-87).

Robinson maintains that in the "modern positivist state the individual still has claims against the state, but increasingly the

claims do not rest on natural right embedded in the social contract; they derive from social conventions as embodied in laws enacted or recognized (as in the common law) by the state." (Ibid., p 87). The positivist approach "has diminished the strength of rights, but it has also broadened their scope." (Ibid., p 102).

Balanced against the property right to practice a profession is the protection of the public interest. Herring argues that the "public interest is the standard that guides the administrator in executing the law" as well as being "the verbal symbol designed to introduce unity, order, and objectivity into administration." (Herring, p 77).

In licensing occupations, the government "uses its police power to enact certain statutes or regulations designed to protect the public's health, safety, and welfare." (Baram, p 63). Stated reasons for licensing occupations include the upholding of "the standards of a profession, with the risk-reduction benefits going to the ultimate consumer or recipient of the professional services." (Ibid.).

Licensing is justified "as a means of protecting an unwary public from risks by those who are inadequately prepared, incompetent, or dishonest." (Ibid., p 62). A licensing board accomplishes this in two ways: it "has the ability to prevent an applicant from taking an entrance examination and also has the ability of later withdrawing the license for conduct that violates articulated criteria," thereby controlling a profession. (Ibid., p 65).

As evidenced by the United States Supreme Court decision of Barsky v Board of Regents, the courts for many years "held that the choice of an occupation was a privilege, not a right, and therefore was not protected by the Fourteenth Amendment." (Ibid.). In recent years, however, the Supreme Court has upheld occupational licensing as the proper exercise of a state's inherent authority to protect the public health, safety and welfare. (Ibid.). The boundaries the Supreme Court has set on licensing are as follows: "specificity (standards and guidelines a board uses in issuing or revoking a license), rationality (the standard must bear a rational relationship to good practice of the profession), and fairness (makeup of the board, process of review, and so forth)." (Ibid.).

As an element of the constitutional right to due process, a licensee or applicant is entitled to notice of disciplinary action proposed to be taken and an opportunity to be heard. (Baram, p 66). This includes the right "to present information or evidence, and to have the opportunity to rebut opposing witnesses." (Ibid.). To prevent the possibility of an alleged incompetent medical practitioner continuing to practice pending licensing action, the courts permit the licensing board, for example, to preliminarily suspend the practitioner's license. (Ibid.).

Review by the courts of licensing actions "is an essential element of the constitutional right of due process, and the courts have the authority to postpone suspension or revocation of a license until a proper judicial review can be had." (Ibid., pp 66-67).

To control entrance to the profession, the typical licensing scheme requires the passing of a licensing board examination. A licensing board "also control[s] the ongoing conduct of those already in by the articulation of performance criteria, which carry the threat of suspension or revocation of license if the criteria are not met." (Ibid., p 67).

C. From a Sociological Perspective.

In his "Social Closure and Occupational Registration," MacDonald maintains that the "concept of social closure is closely linked to the study of professional occupations, because it is those occupations in particular which attempt to achieve market control and collective social mobility by this means." (MacDonald, p 541, cf. Larson 1977). To MacDonald, the "essence of closure is the definition of membership at a particular point in time, and the setting of criteria for those who may join subsequently." (MacDonald, p 541).

MacDonald points out that it was Max Weber who originally developed the concept of closure. (Ibid., 542). Weber and his followers employed the concept "as part of an explanation of how members of a social stratum establish and maintain their status, and of how collective social mobility is achieved." (Ibid., p 541).

In his study of the accounting profession in Britain, MacDonald examined whether registration required by statute achieved closure. He showed "how after decades of attempting to achieve registration, this goal was abandoned, partly because the

costs came to outweigh the rewards and partly because a very similar end was achieved by other means." (Ibid.).

MacDonald concludes that success in achieving closure for an occupational group depends, in large measure, on the market strength of rival occupational groups and argues the following are likely to be significant in gauging whether the attempt at closure will succeed:

> (i) The nature of the clientele. If the clientele and hence its needs are not homogeneous, there will be a tendency for a variety of forms of practice to develop, resulting in an internal stratification of members and of occupational bodies.
>
> (ii) The counterpart to (i) is the nature of occupational knowledge. Given a demand for specific parts of the occupational skills, it is of importance whether or not those parts can be detached (as it were), acquired and used by the informally or partially trained. If they can, it may reinforce the potentiality for a stratified occupation.
>
> (iii) Historical/cultural antecedents. The differences in historical/cultural development of the parts of the United Kingdom permit differential development of occupational organisations on a regional basis, which may foster internal divisions other than those of stratification. (Ibid., p 552)

Conflicts over the desirability of registration, MacDonald maintains, may arise within a profession centering "around the trade-off that high-status members have to make between

existing collective social status and future market control: registration has as an immediate consequence the extension of membership, which in turn will give a near-guarantee of monopoly but also the possibility of a lowering of status (and hence rewards) as a result of association with those of lower standards." (Ibid.). As a result, MacDonald contends, there may be delays in implementing a registration scheme. (Ibid., pp 552-553).

As an alternative to statutory registration (licensing) of professions, MacDonald argues market control can be achieved instead as follows:

> (a) The careful building of professional organizations with reputations for competence, probity and respectability.
>
> (b) The amalgamation of those organizations, while maintaining reputability.
>
> (c) The piecemeal achievement of control by obtaining the statutory restriction of accountancy functions to members of senior professional bodies for an increasing number and range of organizations; at first, public utilities and local authorities, and eventually all public limited companies. (Ibid., p 554, cf. ICAEW, 1951, para 92).

The object of closure is to achieve "a degree of market control which assures good rewards for all and, for those at the peak of the occupation, incomes which may well surpass all other

professionals." (Ibid.). MacDonald concludes from his study of accountants and the concept of social closure that:

> (a) That a legal monopoly is the ideal-typical achievement and that lesser or de facto market control may suffice,
>
> (b) That such an examination illuminates the 'tensions and contradictions' . . . inherent in the professional 'project,' pursued as it is in 'an arena of tension and conflict between groups' . . . and involving 'boundary warfare ranging from small local skirmishes . . . to national battles' . . .
>
> (c) That while the pursuit of registration by statute exposes part of the state/profession relationship, there are other, less obvious, contacts which may be as important, as they are in the case of accountants. (Ibid.).

III. State Regulation of Physical Therapists.

Using physical therapists as an example of how states have regulated occupations, parallels can be drawn between the development of property rights and the evolution of the public interest as a constitutional concept in the United States. The battle has developed into one over how the two could be reconciled, if at all.

As government licensing of occupations developed, the early years saw concerns focusing on "protecting the practitioners from being included in undesirable licensure or registration acts." (Scully and Barnes, p 22). In those days, there was the danger

that physical therapists would be included in the regulation of "healing fads and cults," but for the most part the profession was unregulated. (Ibid.).

By the middle of this century state regulation of physical therapists varied greatly from state to state. Two general trends among the states developed: one, mandatory practice acts, which prohibited practicing physical therapy without a license, provided that "all persons who wished to engage in the practice of physical therapy were required by law to obtain a license to practice," and, two, permissive practice acts, which did not restrict the practice of physical therapy to those registered, "permitted the use of the title of registered physical therapist (RPT) by practitioners who had applied for and been granted registration." (Ibid., p 23).

Over the years since the 1950s, mandatory acts have taken the place of permissive practice acts "setting forth the legal standards for the practice of physical therapy . . . first with a prescriptive relationship required between physical therapist and physician, and later a referral relationship." (Ibid.). By 1988, 20 states had enacted laws permitting practice without referral (direct access). (Ibid., pp 23-24). Presently, 33 states regulate the practice of the profession of physical therapist assistant through "licensure, registration, certification, or a combination of these." (Ibid., p 24).

In Michigan, the Board of Physical Therapy regulates the profession of physical therapy and "was originally formed with the enactment of Public Act 164 of 1965" and on September 30,

1978, "this authority was transferred to the Public Health Code, Public Act 368 of 1978, as amended." (Health Services, p 43).

As defined under the Public Health Code, the practice of physical therapy means:

> "the evaluation of treatment of an individual by the employment of effective properties of physical measures and the use of therapeutic exercises and rehabilitative physical or mental disability. It includes treatment planning, performance of tests and measurements, interpretation of referrals, instruction, consultative services, and supervision of personnel. Physical measures include massage, mobilization, heat, cold, air, light, water, electricity, and sound." (Ibid.).

Michigan prohibits physical therapists from identifying underlying medical problems or etiologies, establishing medical diagnoses, or prescribing treatment. (R §333.17801(1)). Physical therapists are also prohibited from direct access to patients but instead can "engage in the actual treatment of an individual only upon the prescription of an individual holding a license, other than a subfield license, issued" to a dentist, a medical doctor, an osteopath, or a podiatrist or "the equivalent license issued by another state." (R §333.17822).

The Board of Physical Therapy has the following as its scope of responsibility:

> The Public Health Code mandates certain responsibilities and duties for a health professional licensing board. Underlying all

> duties is the responsibility of the board to promote and protect the public's health, safety, and welfare. This responsibility is implemented by the Board by ascertaining minimal entry level competency of health practitioners. The Board also has the obligation to take disciplinary action against licensees who have adversely affected the public's health, safety, and welfare. (Ibid.).

The Michigan Board of Physical Therapy consists of five physical therapists and two public members, each of whom serves a term of four years. (Ibid.). The Board meets every other month, and at meetings the board considers proposed regulations, reviews credentials of applicants for licensing examinations, discusses pending legislation involving the regulation of physical therapists and other health care professionals, and sits as a appeals panel in disciplinary actions.

To show the nature and extent of the Board of Physical Therapy's functions, it is useful to examine figures for its activities for a one-year period. As an example, for the 1988-1989 fiscal year, the last for which total figures are available, the Board's licensing and regulatory activity were as follows:

Licensing Activity

Applications Received	381
Examinations Given	175
Licenses Issued	
By Exam	275

By Endorsement	14
Temporary (Pending Exam)	288
Number of Licensees	2,979
Relicensure	20

Regulatory Activity

Allegations Received	2
Administrative Investigations	3
Administrative Complaints Filed	0
Field Investigations Authorized	0
Investigations Completed	0
Summary Suspensions Filed	0

Board Disciplinary Actions

Reprimand	0
Probation	0
Fine	0
Limited License	1
Voluntary Surrender	0
Suspension	0
Revocation	0
Total Disciplinary Actions	1

(Source: Ibid., p 44)

These figures would tend to show that the Board is more likely in Michigan to rule on qualifications to sit for licensing

examinations rather than to sit as a hearing board for disciplinary actions against physical therapists.

Emergency rules regarding the testing of applicants educated in foreign countries were enacted in Michigan on April 17, 1990. The Board of Physical Therapy made the following finding of emergency in enacting these rules:

> These rules are being processed by the board of physical therapy for the purpose of specifying the requirements for physical therapist licenses for applicants who have obtained their education outside of the United States or the Dominion of Canada. The board finds that health care institutions and agencies throughout Michigan are experiencing a critical shortage of qualified physical therapy personnel and are recruiting a significant number of foreign-educated individuals to provide essential physical therapy services. Since the board's current rules do not specify requirements for applicants educated outside the United States or the Dominion of Canada, the board finds it necessary to immediately implement rule changes to assure qualified applicants are granted licenses to practice physical therapy in Michigan. Therefore, the board finds that the preservation of the public health, safety, and welfare requires promulgation of these rules as emergency rules without following the notice and participation procedures required by sections 41 and 42 of Act No. 306 of the Public Acts of 1969, as amended, being §§24.241 and 24.242 of the Michigan Compiled Laws.

The emergency rules define "completed a physical therapist educational program acceptable to the board" as meaning that "the applicant has completed a physical therapist educational program of not less than 120 weeks in duration, in which not less than 60 weeks are devoted to a professional curriculum which includes, at a minimum, studies" in the scientific rationale of physical therapy, biomedical sciences, laboratory experience, physical therapy modalities, and research methodology, all of which are explained in more detail in the emergency rules. (Emergency Rule 1(c)).

The emergency rules also adopt the standards of American Physical Therapy Association (APTA) approved in June 1978. The "Standards of Practice for Physical Therapy" established by the APTA "describes the conditions and performance that are considered by the Association essential for quality physical therapy services." (Scully and Barnes, p 24).

As typically a distinct unit within a health care facility, the physical therapy department operates within guidelines established by accrediting agencies like the APTA "on standards appropriate to the types of services" rendered. (Ibid.). Critics, however, maintain that "[b]oundaries established by law" on the practice of physical therapy "have limited the continued development of the preventive aspects" of the field. (Ibid.).

> Too often in our history, scenarios have developed where participation by a physical therapist in programs for assessment and prevention of movement dysfunction would be considered illegal and unethical in the

> absence of physician involvement, and the program would then be left in the hands of someone less qualified than the physical therapist. (Ibid.).

While supporting changes in state laws, beginning with Maryland and California, permitting physical therapists to treat patients without physician referrals, other critics maintain these changes "will place a greater legal responsibility on the [physical therapy] profession, and the profession must meet this challenge." (Horsh, p 173).

Horsh, in fact, argues that a "primary method of meeting this challenge is for the profession to take steps to minimize the possibility that those individuals lacking the necessary knowledge and skill are allowed to practice." (Ibid., pp 173-174). He urges the "[e]stablishing of standards" as one of these steps. (Ibid., p 174).

The standards to which Horsh refers are those of the APTA which not only govern "a wide range of individual practitioner obligations" but also the practitioner's personal qualities, ethical conduct, consultation, and community responsibility. (Ibid.).

Adoption of the standards of an accrediting agency, like the APTA, assures that the delicate balance between the right of the practitioner to practice physical therapy and the public interest in protecting society from incompetent or untrained practitioners are both protected.

Horsh maintains: "These standards provide a method by which the profession can measure optimal performance, and they

represent the heart of the profession -- service to society. Further, standards such as these can be expected to affect licensure requirements and preparation for entry into the profession." (Ibid.).

The standards of professional associations like the APTA do "more to protect the autonomy and survival of the professions than the needs of the public." (Schneider, p 479). Efforts to streamline and, in some cases, consolidate regulatory agencies within states "have been designed to diminish the control of professional interests over the boards and to make these agencies more accountable public organizations." (Ibid.).

Conflicts over private and public rights are being redressed in growing numbers in antitrust and malpractice litigation and by professionals who are "enlisting constitutional guarantees and administrative safeguards to nullify oppressive entry and practice standards promulgated by state licensing boards." (Rubin, p 29). The physical therapist practicing in Michigan faces squarely the issue of the conflict between private and public rights on the question of direct access. Whether the direct access question is addressed in the context of regulatory change, professional association rulemaking, or in the courts depends on the degree to which the affected interest groups are willing to compromise on questions involving the independence of and control over physical therapists.

Conclusion

This paper has highlighted issues involving private rights and public interests in regulating occupations like physical therapists. In this concluding section, we see that what is really at issue with any regulation of an occupation is in reality the extent to which the profession itself demands and makes input into the regulatory process. Sunset laws and public members on a regulatory board are designed to ensure maximum protection of the public interest. (Rubin, pp 38-39).

But it is the regulated profession itself that has the majority of members on a state regulatory board. Therefore, it is the profession itself that has an influence, if it chooses to exercise that influence, on the nature and extent of its own regulation by its exercise of any rulemaking authority granted to it by the legislature. There is no question that many influences affect the legislative regulation of a particular occupation, but the overriding influence is that of the regulated profession itself. (Ibid., pp 36-37). In cases where the interests of competing groups are divisive rather than cohesive conflicts over rights are resolved ultimately in the courts. (Ibid., p 43).

In devising licensing schemes over individual occupations, the states face the neverending conflict between the individual's right to practice the occupation and the public interest in protecting society by devising minimum education and practice standards.

For the field of physical therapy, the debate over whether therapists should be allowed direct access to patients, in other words, practice without physician referral, demonstrates how the conflict between the right to practice and the public interest in protecting society remains at the forefront over government regulation of occupations. Beginning with New York in 1926, state licensing of physical therapists was required in every state by 1972. (Burch, p 24). Direct access was first introduced at the APTA in 1973 and adopted in 1979 by its House of Delegates. (Ibid., pp 24-25).

To help ensure the competence of physical therapists practicing without physician referral, the APTA adopted the following guidelines for identifying the competencies "that the therapist would be required to possess in order to practice" without prior physician referral:

> 1. The physical therapy curriculm content necessary to achieve the identified competencies for practice independent of practitioner referral.
>
> 2. The revisions necessary to the Standards for Accreditation of Physical Therapy Education Programs.
>
> 3. A proposed time table for the accomplishment of curricula changes.
>
> 4. A draft of model legislative changes for state chapters. (Ibid., p 25).

Technology and clinical research will not only continue to lead to growth and changes in the field of physical therapy itself but will also lead to changes in the nature of the relationship between the patient and the physical therapist. This will, in turn, lead to further changes in the way government regulates the field. (Horsh, p 34).

Horsh, in fact, maintains that "[p]hysical therapists who occupy managerial and supervisory positions will be directly involved" in legislation which is rapidly and constantly being revised in this technology-driven profession. (Ibid.).

In today's regulatory environment, sunset laws have been passed in 26 states in "an effort by state legislators to restore accountability and operational efficiency to regulatory agencies by means of periodic review, reassessment, and reform, where appropriate." (Rubin, p 38). Under these laws, boards "whose regulatory performance has not measurably served the public interest are subject to partial or complete abolition." (Ibid.).

As another means of protecting the public interest in regulating professions, laws have been passed in some states, including Michigan, requiring the public (lay) members be added to the regulatory boards. (Ibid.).

Rubin cites the following as the impact of sunset laws on state and local licensing boards:

> Were sunset the success originally envisioned, the state licensing landscape would show signs of significant alteration. It does not. Nor are the reasons difficult to trace. Allowed to develop in a regulatory

> framework largely of their own making, and now in full command of public health, the legal system, finance, science, and technology, the professions today are politically powerful and entrenched, especially at the state and local levels. For many state legislatures the sunset process is an uneven contest, in which professional regulation emerges substantively unscathed and, worse, with the seal of reform approval.
>
> If reform in the public interest truly is to occur, many believe the proper avenue is not the state legislature, but the federal government or the courts. Both alternatives have been resorted to, with the one conclusive result that the law relevant to the professions is daily becoming more complex. (Ibid., p 39).

On both the federal and state levels, public rights are being protected by antitrust and civil rights acts against unlawful practices by professionals. In addition, private actions brought under these acts seek to redress unlawful acts are sanctioned by the award of attorney fees for "the successful plaintiff." (Rubin, p 43).

As government assumes greater responsibility for social welfare in the name of the public interest, the law is beginning to recognize "an entitlement to essential professional care and service." (Ibid.). Balanced against this is the "reservoir of private rights" in the Consitution, which, as Rubin observes, "protects specified civil liberties against unreasonable government intrusion." (Ibid.).

Rubin identifies those civil liberties as follows:

> Among the freedoms deeply etched in our collective conscience is the right to choose one's livelihood; to hold property and reputation intact against undisciplined state interference; to speak, associate, and travel freely; and to find equal and unbiased treatment at the hands of the state or the state's ministers. (Ibid.).

As the forum where the conflict between these private rights and the public interest has been in the forefront, the courts, led by the United States Supreme Court, have in recent years quantified the balancing of these interests in terms of procedural due process. In the 1972 cases of Board of Regents v Roth and Perry v Sindermann, the Supreme Court "began systematically to identify state-based 'property' and 'liberty' interests which are entitled to procedural protections." (Ibid., p 44).

Later, the high court removed "self-interested professional boards from the licensing disciplinary process," leading to the codification of 14th Amendment procedural safeguards in state administrative procedure acts. (Ibid.).

Other forms of state regulation have been stricken down as well, an example being "absolute state prohibitions on professional product (prescription drugs) and service (routine legal services) advertising" as violating what was found to be the First Amendment's guarantee of freedom of commercial speech. (Ibid., p 45).

Also held illegal by the courts have been regulations imposing unduly long residency requirements and those found to result in "overt race, creed, and gender discrimination." (Ibid.). As a result of civil rights litigation affirming these liberties, "the economic and social barriers to professional practice that were once prominent in the United States" have been "largely erased." (Ibid.).

The competing interests that make up the pluralistic nature of government in the United States make it highly likely that in the years ahead we will see efforts at deregulation stall. Rubin predicts the following in the future:

> Substantial deregulation of existing professional practice acts by the states cannot be ruled out, as the current state sunset process reveals. Nor is this entirely the fault of state officials. Although consumers clamor today for less state control, they are quite unwilling to assume greater informational search costs and increased risk attending the absence of state licensing. Registration and certification, less restrictive alternatives to full licensure, simply do not offer the same degree of apparent consumer security, nor are they likely to be tolerated by the politically entrenched professions. More likely is greater state resistance to demands for licensing by new professional groups, as well as an effort by the states to relax arbitrary practice divisions among existing licensed professions. (Ibid., pp 46-47).

To gain public acceptance of greater efforts at licensing more professions and of greater regulation in those already regulated, licensing boards must be perceived as acting "in the public interest objectively and sensitively." (Baram, p 70). Baram prefers to have regulatory boards "of public servants who are accountable to mutiple public interests." (Ibid., pp 70-71).

He proposes that this be done by providing for "accountability of board decisions through judicial review," by screening "potential board members for bias and conflicts," and by having "public representatives serve on such boards, as is done in California" and Michigan. (Ibid., p 71). Baram argues that "further licensure offers an alternative to risk regulation worthy of further consideration, particularly for risk contexts where certain professionals will play very significant roles (examples are operators of waste facilities and nuclear power plants, transporters of hazardous wastes, and designers of high-risk products)." (Ibid.).

Played out in legislatures, regulatory boards, and courts, the conflict over private and public rights is important to the future of regulation. If balanced heavily in favor of private rights, the regulation of occupations by state boards becomes meaningless and leaves the protection of the public interest to the vagaries of the marketplace, which by itself will not work if the public is deprived of sufficient information on which to make informed judgments about the quality of services. If balanced heavily in favor of public rights, the regulation of professions in terms of entry and conduct could well become so stifling as to

inhibit initiative and the freedom to choose an occupation. (Rubin, pp 43-45). The challenge clearly is to achieve that delicate balance between private rights and the public interest.

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